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**IN THE
COURT OF APPEALS OF INDIANA**

KERRY T. SMITH, as the Personal Representative
of the Estate of DIXIE CLICK-SMITH,

Appellant-Plaintiff,

VS.

No. 49A04-0605-CV-250

DEARBORN COUNTY HOSPITAL, an Indiana Corporation or Association and Health Care Provider, and CAROL M. LOVINS, M.D.

Appellees-Defendants.

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Charles J. Deiter, Judge
Cause No. 49D08-0306-PL-1364

May 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

The Estate of Dixie Click-Smith, by its personal representative Kerry T. Smith, (“the Estate”) appeals the trial court’s order denying its motion to correct error, which sought relief from the trial court’s order granting a motion for judgment on the evidence filed by the Dearborn County Hospital and Dr. Carol M. Lovins (collectively “the defendants”) in the Estate’s medical malpractice action. The Estate raises the following two restated issues:

- I. Whether the trial court abused its discretion in denying the Estate’s motion to correct error challenging the trial court’s grant of the defendants’ motion for judgment on the evidence on the issue of informed consent; and
- II. Whether the trial court erred in failing to remove Juror Number 2.

We affirm.

FACTS AND PROCEDURAL HISTORY

Thirty-four-year-old Dixie Click-Smith (“Click-Smith”) was transported by ambulance to the Dearborn County Hospital (“the Hospital”) at approximately 2:00 a.m. on December 13, 1997. When she arrived at the Hospital, Click-Smith told the emergency department physician that she had had several episodes of diarrhea and vomiting throughout the day. She also suffered from stomach pain and felt like she was going to pass out when she sat up. The physician ordered laboratory tests, which revealed that Click-Smith was pregnant.

At 4:00 a.m., the physician contacted obstetrician/gynecologist Dr. Carol Lovins (“Dr. Lovins”) because of the possible diagnosis of a ruptured ectopic pregnancy. Dr. Lovins arrived at the hospital at 4:35 a.m. Click-Smith’s mother was at Click-Smith’s bedside. Dr. Lovins examined Click-Smith and discovered that Click-Smith’s abdomen was tender and rigid with rebound consistent with an acute abdomen, a surgical emergency.

A pelvic ultrasound revealed a small irregularly shaped gestational sac in the right cornua of Click-Smith's uterus. The fallopian tube enters the uterus at the cornua, and a gestational sac in this area is a type of ectopic pregnancy. The ultrasound also revealed fluid outside the uterus consistent with blood from an ectopic pregnancy.

Dr. Lovins reviewed and explained the ultrasound findings to Click-Smith, a nurse. Dr. Lovins diagnosed Click-Smith with a possible ectopic pregnancy; disseminated intravascular coagulation ("DIC"), which results in the formation of small blood clots throughout the body; and possible sepsis, a severe illness caused by overwhelming infection of the bloodstream by toxin producing bacteria. Dr. Lovins recommended emergency surgery for Click-Smith, including an exploratory laparotomy to open up her abdomen, a possible salpingectomy to remove her fallopian tubes, and a possible hysterectomy.

Dr. Lovins discussed the surgery with Click-Smith between 5:00 and 5:15 a.m. in the presence of Click-Smith's mother. Dr. Lovins told Click-Smith the risks of the laparotomy, including bleeding, infection, pulmonary embolism, intraoperative complications, anesthesia reactions, cardiac arrest, and death. Click-Smith gave Dr. Lovins verbal consent to perform the surgery and told Dr. Lovins to do whatever she needed to do.

Although Click-Smith was lucid and discussed the surgery and its risks with Dr. Lovins, the physician asked Click-Smith's mother to sign the surgical consent form because Click-Smith had received Demerol, a narcotic, for pain during the pelvic ultrasound. Evelyn Click signed the consent acknowledging that Dr. Lovins had explained: 1) how the procedure was to be performed; 2) the reasonably expected risk and possible side effects; 3) the risks of severe blood loss, infection, respiratory and cardiac arrest; 4) the other

procedures that could be used to diagnose and treat the condition; and 5) that there was no guarantee the procedure would improve Click-Smith's medical condition.

From 5:15 a.m., when Click-Smith's mother signed the consent to surgery, until Click-Smith went to the operating room at 7:00 a.m., Click-Smith's abdomen became more tense and enlarged. In addition, Click-Smith developed petechiae, little purple or rose-colored dots that are a sign of bleeding and DIC, as well as bleeding from her gums.

Dr. Lovins began the surgery at 7:25 a.m. When she cut into Click-Smith's abdomen, the physician discovered a straw-colored liquid consistent with a septic condition rather than blood from a ruptured ectopic pregnancy. At 7:45 a.m., Dr. Lovins requested an intraoperative surgical consultation from Dr. Carr to look for the possible source of the sepsis. Dr. Carr looked for this source from 8:00 a.m. until 10:20 a.m., when Click-Smith went into cardiac arrest, and died. The cause of death was determined to be sepsis; septic shock, a serious condition that occurs when an overwhelming infection leads to organ failure; and ultimately cardiac arrest.

In December 1999, the Estate filed a complaint for medical malpractice against the Hospital, Dr. Lovins, Dr. Carr, and others with the Indiana Department of Insurance. The complaint alleged that the Hospital and doctors had negligently caused Click-Smith's death.

The Estate filed a complaint against the same defendants in Marion Superior Court in June 2003. In May 2004, a medical review panel issued a unanimous opinion that the evidence did not support the conclusion that Dr. Carr and the Hospital failed to meet the applicable standard of care as charged in the complaint. Two of the physicians on the panel found that the evidence did not support the conclusion that Dr. Lovins failed to meet the

standard of care. One of the physicians on the panel concluded, however, that Dr. Lovins failed to comply with the appropriate standard of care, but opined that the “conduct complained of was not a factor of the resultant damages.” *Appellant’s App.* at 80.

The case eventually proceeded to trial against Dr. Lovins, Dr. Carr, and the Hospital. In its case-in-chief, the Estate presented a videotaped deposition of Dr. Michael Golding, the Estate’s medical expert from New York. Dr. Golding testified that in his opinion, Dr. Lovins was negligent. Specifically, Dr. Golding opined that the exploratory laparotomy was too invasive based upon Click-Smith’s condition, and that Dr. Lovins should have availed herself of other less invasive methods for determining whether the fluid found outside of Click-Smith’s uterus was infection or blood and ruling out an ectopic pregnancy.

At the close of the Estate’s case in chief, Dr. Lovins and the Hospital moved the trial court for judgment on the evidence on the issues of informed consent and hospital liability. The trial court granted judgment on the evidence in favor of Dr. Lovins and the Hospital only on the informed consent claim. The remaining claims were submitted to the jury, which found in favor of Dr. Lovins and the Hospital. The Estate filed motions to correct error and for a new trial solely on the informed consent claim. The trial court denied the motions, and the Estate appeals.

DISCUSSION AND DECISION

I. Informed Consent

The Estate first argues that the trial court erred in denying its motion to correct error challenging the trial court’s grant of the defendants’ motion for judgment on the evidence on the issue of informed consent. Specifically, the Estate contends that Dr. Lovins did not

obtain proper informed consent from Click-Smith because the physician failed to disclose that death was a risk in the exploratory laparotomy.

We review the trial court's decision to deny a motion to correct error for abuse of discretion. *Benjamin v. Benjamin*, 849 N.E.2d 719, 723 (Ind. Ct. App. 2006). An abuse of discretion will be found when the trial court's action is against the logic and effect of the facts and circumstances before it and the inferences that may be drawn therefrom. *Id.* An abuse of discretion also results from a trial court's decision that is without reason or is based upon impermissible reasons or considerations. *Id.*

Motions for judgment on the evidence, which test the sufficiency of the evidence, are governed by Indiana Trial Rule 50, which provides in pertinent part as follows:

Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict.

Ind. Trial Rule 50(A)(cited in *Lightning Litho, Inc. v. Danka Industries, Inc.*, 776 N.E.2d 1238, 1240 (Ind. Ct. App. 2002), *trans. denied*).

The granting of a motion for judgment on the evidence is a matter committed to the sound discretion of the trial court and will be reversed only if the trial court has abused its discretion. *Lightning Litho*, 776 N.E.2d at 1240. On appeal, we employ the same standard as the trial court. *Id.* We consider the evidence in the light most favorable to the non-moving party. *Id.* Judgment may be entered only if there is no substantial evidence or reasonable inferences to be drawn therefrom to support an essential element of the claim. *Id.*

Under the doctrine of informed consent, a doctor must disclose the facts and risks of

a treatment, which a reasonably prudent physician would be expected to disclose under like circumstances and which a reasonable person would want to know. *Hamilton v. Asher*, 846 N.E.2d 309, 317 (Ind. Ct. App. 2006), *reaff'd on reh'g*, 850 N.E.2d 466 (Ind. Ct. App. 2006), *trans. denied*. This is separate and apart from the doctor's duty to exercise the degree of care and skill exercised by reasonably careful and skillful practitioners in the same class to which he belongs, acting under the same or similar circumstances. *Id.* It is possible for a doctor to perform a surgery for which there was no informed consent in a medically appropriate way such that the patient has only a cause of action for the failure to receive informed consent and not also for medical malpractice in the performance of the procedure. *Id.*

Here, the Estate claims that Dr. Lovins failed to disclose to Click-Smith that death was a risk in the laparotomy. Specifically, the Estate first complains that Click-Smith did not sign the written consent form. However, IC Section 34-18-12-2 provides that if a patient's written consent is signed by the patient or the patient's authorized representative, there is a rebuttable presumption that the consent is an informed consent. Click-Smith's mother was at her daughter's bedside during her daughter's hospital stay and signed the consent because Click-Smith had been given narcotics before her pelvic ultrasound. The Estate has failed to rebut the presumption that this was an informed consent.

The Estate next complains that the written consent did not specifically state that death was a risk of the procedure. However, IC Section 34-18-12-6 provides that neither the physician's disclosure nor the patient's consent is required to be in writing. Here, Dr. Lovins testified that she told Click-Smith, a nurse, that death was a risk of the laparotomy, and that

Click-Smith gave her verbal consent to the surgery and told her to do whatever she needed to do. This undisputed evidence belies the Estate's contentions that Dr. Lovins did not disclose the risk of death and did not obtain proper informed consent from Click-Smith.

We further note that even in the absence of this evidence, the Estate's claim would fail. First, except in those cases where deviation from the standard of care is a matter commonly known by lay persons, expert medical testimony is necessary to establish whether a physician's disclosure of risks comports with what a reasonably prudent physician would have disclosed. *Culbertson v. Mernitz*, 602 N.E.2d 98, 104 (Ind. 1992). Here, we cannot say that the risk of death from an exploratory laparotomy is a matter commonly known to lay persons. Therefore, the Estate needed to provide expert medical testimony to present a material issue of fact as to what a reasonably prudent physician would have discussed concerning this surgery.

In addition, under the doctrine of informed consent, expert opinion is generally necessary to establish the causal connection between the inadequate disclosure and the resulting damages. *Bunch v. Tiwari*, 711 N.E.2d 844, 850 (Ind. Ct. App. 1999). Such causal connection arises only if it is established that had the revelation been made, consent to treatment would not have been given. *Boston v. GYN, Ltd.*, 785 N.E.2d 1187, 1192 (Ind. Ct. App. 2003), *trans. denied*. Here, however, the Estate presented no such evidence.

Based upon the foregoing, the trial court did not err in granting the defendants' motion for judgment on the evidence on the issue of informed consent and in denying the Estate's motion to correct error.

II. Removal of Juror

The Estate next argues that the trial court erred in denying its motion to excuse Juror Number 2. However, our review of the transcript reveals that the Estate never made such a motion. Rather, near the end of trial, counsel for the Estate advised the court outside the presence of the jury that Juror Number 2 had been rolling her eyes and making faces throughout trial. Counsel asked the trial court to ask the juror if she had formed an opinion about the ultimate issue in the case. If she responded affirmatively, counsel asked the court to dismiss her. If she responded negatively, counsel asked the court to admonish her not to make any more faces.

The trial court brought Juror Number 2 into the courtroom and asked her whether she had already made up her mind about the verdict. Juror Number 2 responded that she had not. After the juror was escorted out of the courtroom, the trial court told counsel for the Estate that the court intended to admonish the juror about being too demonstrative. The trial court asked counsel if he had any other motions. Counsel responded that he did not. The trial court brought Juror Number 2 back into the courtroom, admonished her not to make any more faces and not to make a decision on the verdict until she had heard all of the evidence. When asked if she could comply with the admonishments, the juror responded that she could. There were no further complaints about or problems with this juror.

Because counsel for the Estate never made a motion to dismiss Juror Number 2, this argument is waived. *See Stainbrook v. Low*, 842 N.E.2d 386, 396 (Ind. Ct. App. 2006), *trans. denied* (stating that party who raises issue for first time on appeal has waived appellate review of issue).

In an attempt to avoid the waiver doctrine, the Estate argues that the trial court's failure to dismiss the juror constituted fundamental error. The fundamental error exception is extremely narrow. *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002). To qualify as fundamental error, an error must be so prejudicial to the rights of a party as to make a fair trial impossible. *Id.* Here, at the time she was questioned, Juror Number 2 told the trial court that she had not yet made up her mind about the verdict. She also agreed not to make any more faces and not to make a decision about the case until she had heard all of the evidence. There is nothing in the transcript that suggests the Estate had any further complaints about the juror. Under these circumstances, we find no fundamental error.

Affirmed.

RILEY, J., and FRIEDLANDER, J., concur.